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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DAVID VANG, Defendant and Appellant.	C037155 (Super. Ct. No. F02871)

A jury convicted defendant David Vang of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1); further undesignated statutory references are to the Penal Code), and found true allegations that he personally inflicted great bodily injury (§ 12022.7, subd. (a)), and committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). He was sentenced to state prison for eight years.

On appeal, defendant contends (1) an expert witness improperly expressed an opinion as to the ultimate issue of his

guilt, and (2) there was insufficient evidence of a pattern of criminal gang activity. We shall affirm the judgment.

FACTS

Kao Nai Saephan was severely assaulted on the evening of March 28, 2000, while he and several friends were riding bicycles around their neighborhood. Saephan, who was 13 years old at the time, was hospitalized for four days with a broken rib and a pencil stab wound to the back. Saephan required surgery to reduce the swelling in his head. Staples and stitches were required to close wounds to his head.

At the time of the assault, Kao Koy Saechao, a school friend of the victim, heard yelling and stepped outside his grandmother's house. He saw a group of six to eight people across the street from a market. Saechao saw two of those people stomping and kicking Saephan, who was on the ground. Saechao identified the two assailants as Mai Vue and Choa Vang. As the group ran off, Saechao heard some of them yell, "Hmong pride" or "TLR."

Kao Wern Saeturn, another friend of victim Saephan, was also present and saw the attack. Saeturn saw eight to twelve people swearing, hitting and swinging. Saephan tried to run, but the group continued to assault him until he fell to the ground. Saeturn saw eight people participating in the beating; each of them was hitting and kicking Saephan. The group beat Saephan until he lost consciousness. One of the perpetrators had a red rag in his hand. Saeturn believed that Vue's older brother, "Doggie," was the one that was holding the rag. The

victim and his friends are Mien, and the assailants are Hmong. Apparently, the Hmong are hostile towards persons of Mien descent.

Ly Chiew Saeyang, a friend of the victim from the neighborhood and school, also saw the beating. Saeyang went outside when he heard someone yelling that their friend was being assaulted. Saeyang saw approximately eight people punching and kicking his friend. Saeyang recognized Mai Vue and Choa Vang as two of the assailants. Saeyang observed one perpetrator holding a red rag. Saeyang identified defendant at a photographic lineup, again at the preliminary hearing, and again at trial, as one of the assailants who was involved in kicking and hitting Saephan.

Nai Wang Saephanh explained that he and victim Saephan were riding a bicycle near a market when defendant pushed Saephan off the bicycle. Saephanh saw defendant grab Saephan and throw him to the ground. Saephanh described a group of approximately eight people attacking Saephan. Saephanh also noticed that defendant was the one holding the red rag in his hand. Saephanh also confirmed that defendant is Mai Vue's brother. Saephanh stated that the group of assailants displayed gang signs before they attacked.

Julius Wallace, a security officer for a middle school, testified that he knew defendant, who had previously been a student. Wallace was aware that defendant was affiliated with a Hmong gang called "Tiny Little Rascals," and that he was referred to as "Doggie." Wallace had spoken to student Ly

Saeyang and had been told that defendant was one of the attackers.

Defendant's brothers, Mai Vue and Jai Vue, testified and admitted having been involved in the attack and having pleaded guilty to charges associated with the beating. Jai admitted a gang-benefit enhancement. Both denied that their brother, defendant, was involved in the attack.

Detective Sharon McClatchy testified that she has extensive experience with Asian gangs. She explained that she interviewed Mai Vue. Contrary to his testimony at trial, Mai Vue told McClatchy that defendant admitted being involved in the assault.

Detective Tadao Paul Suwa testified that he worked on Asian gang cases. Suwa interviewed Jai Vue, who had admitted, contrary to his trial testimony, that defendant was present at the assault.

Detective James Kang testified regarding his experience and training in gang-related police work. Kang is familiar with the gang known as "Tiny Little Rascals" or "TLR," which has about 99 members in the Sacramento area. Another gang, called "Insane Hmong Pride" or "IHP," is now considered the same gang as TLR. Defendant's brother Jai Vue is a confirmed member of TLR. Jai Vue admitted that defendant is a member of IHP.

Based upon information that Kang had gathered from several sources, including defendant's admission, Kang opined that defendant was a member of TLR. Kang reviewed the reports of defendant's assault upon the victim in this case, and opined that the assault was for the benefit of defendant's gang, TLR.

The assault by a mob of individuals surrounding a single victim, coupled with the gang-related language and hand signs used by the perpetrators, made it clear that this was a gang fight.

Defendant testified on his own behalf. He admitted that he was a member of IHP, and that previously he had been a member of TLR. Defendant admitted that gang activities include assaults, thefts and burglaries. He also admitted that he and fellow gang members had stolen a car. However, he was unwilling to tell the jury about other crimes he had committed for which he had escaped prosecution. Defendant claimed that he was no longer involved in gang activities. Defendant claimed he did not participate in the assault on the victim, but rather came upon the group as they were returning from the assault.

DISCUSSION

I

Defendant contends the trial court erred prejudicially by allowing Detective Kang to testify regarding the ultimate issue of defendant's guilt of the gang enhancement, i.e., to opine that the offense was committed for the benefit of a criminal street gang. The issue is not properly before us and, in any event, has no merit.

"'It is, of course, "the general rule"' -- which we find applicable here -- '"that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal."'" (*People v. Waidla*

(2000) 22 Cal.4th 690, 717, quoting *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7; see Evid. Code, § 353.)

In this case, defendant objected to Kang's testimony on several grounds: that it was inadmissible character evidence, narrative, irrelevant, substantially more prejudicial than probative, lacking foundation, multiple hearsay, and violative of his federal confrontation and fair trial rights. However, defendant never objected that the testimony embraced the ultimate issue of his guilt of the gang enhancement.[1] Thus, that issue is not properly before us. (*People v. Waidla, supra,* 22 Cal.4th at p. 717.)

In any event, "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of the fact." (Evid. Code, § 805; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371.)

To be "otherwise admissible," expert opinion testimony must be "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." (Evid. Code, § 801, subd. (a).) The culture, habits and psychology of criminal street gangs meet this criterion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617;

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[1] Defendant claims his trial counsel's "objection based on the lack of adequate foundation for the opinion" incorporates an objection on the grounds raised on appeal. However, counsel's foundational objection did not contend that a witness "cannot express an opinion concerning the guilt or innocence of the defendant."

People v. Valdez, supra, 58 Cal.App.4th at p. 506; *People v. Olguin, supra,* 31 Cal.App.4th at pp. 1370-1371.)

Defendant disagrees, claiming the facts of the case were "simple," "not difficult to understand or to interpret," and "more than adequately presented" by other "evidence before the jury." However, no other evidence explained that the manner of the assault, in which a mob of individuals surrounded a single victim and beat him to the ground, identified the incident as a stereotypical gang fight. Moreover, whether the manner of the attack identified it as a gang fight was far "beyond common experience." (Evid. Code, § 801.)[2] Thus, admission of the expert's testimony was not a clear abuse of discretion. (*People v. Valdez, supra*, 58 Cal.App.4th at p. 506; *People v. Page* (1991) 2 Cal.App.4th 161, 187.)

II

Defendant contends the gang-benefit enhancement (§ 186.22, subd. (b)(1)) is not supported by sufficient evidence of a "pattern of criminal gang activity" (§ 186.22, subd. (e)). We are not persuaded.

"'To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the

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[2] We thus reject defendant's contention that it was "improper and prejudicial" for the prosecutor to argue in closing summation that the expert "possessed some special knowledge, outside the jury's experience," supporting his opinion that the crime was committed for the benefit of a gang.

evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387, quoting *People v. Johnson* (1993) 6 Cal.4th 1, 38; see *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560].)

Section 186.22 "defines 'criminal street gang' as any ongoing association that consists of three or more persons, that has a common name or common identifying sign or symbol, that has as one of its 'primary activities' the commission of certain specified criminal offenses, and that engages through its members in a '*pattern of criminal gang activity*.' [Citation.] A gang engages in a 'pattern of criminal gang activity' when its members participate in 'two or more' statutorily enumerated criminal offenses (the so-called 'predicate offenses') that are committed within a certain time frame and 'on separate occasions, or by two or more persons.' [Citation.]" (*People v. Zermeno* (1999) 21 Cal.4th 927, 930, italics in original.)

In *People v. Gardeley, supra*, 14 Cal.4th 605, the court held "that the prosecution had established the statutorily required 'two or more' predicate offenses 'on separate occasions, or by two or more persons' by proof of the defendant's commission of" (1) the charged offense of aggravated assault and (2) an earlier incident in which a fellow gang

member had shot at an occupied dwelling. (*People v. Zermeno, supra*, 21 Cal.4th at p. 931; *People v. Gardeley, supra*, at p. 625.)

"Then in *People v. Loeun* (1997) 17 Cal.4th 1, 10 [] (*Loeun*), [the Supreme Court] held that proof of the statutorily required 'two or more' offenses committed 'on separate occasions, or by two or more persons' was satisfied by evidence of (1) the charged crime of assault with a deadly weapon, and (2) a separate assault with a deadly weapon on the same victim committed contemporaneously with the charged offense by the defendant's fellow gang member. [The court] explained: 'In *Gardeley*, not only were the predicate offenses committed on separate occasions, but they were also perpetrated by two different persons. The pertinent statutory language does not require proof, however, that the two or more predicate offenses must have been committed both on separate occasions and by different persons. Under the statute, the pattern of criminal gang activity can be established by proof of "two or more" predicate offenses committed "on separate occasions, *or* by two or more persons." [Citation.] . . . Therefore, when the prosecution chooses to establish the requisite "pattern" by evidence of "two or more" predicate offenses committed on a single occasion by "two or more persons," it can, as here, rely on evidence of the defendant's commission of the charged offense and the contemporaneous commission of a second predicate offense by a fellow gang member.'" (*People v. Zermeno, supra*,

21 Cal.4th at p. 931, emphasis in original; *People v. Loeun, supra*, at pp. 9-10.)

Loeun was distinguished in *People v. Zermeno, supra*, 21 Cal.4th 927, where the defendant assaulted the victim and his fellow gang member aided and abetted him by preventing the victim's associates from coming to the victim's aid. There, the combined activity of the defendant and his fellow gang member "was, under applicable law, but one offense," not the two required by section 186.22, subdivision (e). (*People v. Zermeno, supra,* at p. 931.)

Defendant claims the present case is similar to *Zermeno* and dissimilar to *Loeun*. We disagree.

Nai Wang Saephanh, the witness who was closest to the victim when the assault began, described defendant initiating the assault when he pushed Saephan off the bicycle. Other witnesses also described defendant actively participating in the assault. This is sufficient evidence that *defendant* did not act merely as an aider and abettor. (*People v. Carpenter, supra,* 15 Cal.4th at p. 387.)

There was also testimony that as many as eight others were beating, hitting, kicking and punching the victim. Unlike *Zermeno*, these others did not merely aid and abet defendant by holding rescuers at bay. Nor did the evidence suggest that the others' beating, hitting, kicking and punching was *unlikely* to

produce great bodily injury.[3] (§ 245, subd. (a)(1).) Thus, there was sufficient evidence of *two* predicate offenses, not just one as in *Zermeno*. (*People v. Loeun, supra*, 17 Cal.4th at pp. 9-10; *People v. Carpenter, supra,* 15 Cal.4th at p. 387.)

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

DAVIS, Acting P.J.

MORRISON, J.

[3] It was not necessary for the jury to determine which blow or blows *actually* caused serious bodily injury, or who inflicted the particular blows that did so. The evidence showed that several persons inflicted blows that were *likely* to produce great bodily injury. That was sufficient.